In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 826

DONALD J. MARIANI, PETITIONER

v.

JAMES T. FOLEY, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of the order of the United States Court of Appeals for the Second Circuit entered on October 10, 1968 denying his application for a writ of mandamus to compel the district court to hear and decide his motion challenging the validity of his arrest. The relevant facts[1] show that on April

[1] These facts appear from the pleadings in the courts below presently on file with the Clerk of this Court.

8, 1968 a warrant for petitioner's arrest was issued by a United States Commissioner in the Northern District of New York, charging that he had participated in the theft of 824 cases of Scotch whiskey moving in interstate commerce, in violation of 18 U.S.C. 659. In support of the warrant an affidavit was filed by an F.B.I. agent setting forth information that on the early morning of March 2, 1968 several men had illegally removed liquor from a trailer truck at the Express Terminal in Rensselaer, New York into two U-haul vans and had thereafter transported the liquor to a garage in Albany, New York. The affidavit recited that petitioner[2] had been identified by an employee of the rental agency as one of the three individuals who rented the U-haul trucks a few hours before the theft (Ex. A). On April 9, 1968, petitioner appeared before the Commissioner and was released on $5,000 bail. Preliminary hearing was set for May 14, 1968. Thereafter, at the government's request, the hearing was rescheduled for June 18, 1968.

On June 17, 1968, a hearing was held before District Judge Foley on petitioner's motion to dismiss the complaint on the ground that there was no probable cause for the issuance of the arrest warrant (Ex. C). At the hearing, government counsel noted that nothing had been seized from petitioner at the time of the arrest; that a hearing was scheduled before the Com-

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[2] Altough the petitioner asserts that the only mention of petitioner in the affidavit is a reference to a Dominick Marino (Pet. 4), the affidavit makes clear that "Marino" was petitioner Donald Mariani.

missioner the following day to determine the probable cause issue and that there was no reason for the district judge to intervene at this preliminary stage. The court agreed and denied the motion (Ex. G). We have been advised by the United States Attorney that, at a hearing held June 19, 1968, the Commissioner determined that there was probable cause for the issuance of the warrant for petitioner's arrest; and that on December 20, 1968, an indictment was returned against petitioner charging theft of the liquor from an interstate shipment.

The petition does not raise any issue that would warrant the issuance of a writ of mandamus. The grand jury has returned an indictment finding sufficient cause to try petitioner for the offense for which he was originally arrested. He is thus subject to trial irrespective of the validity of his original arrest. See *Frisbie* v. *Collins*, 342 U.S. 519; *Ker* v. *Illinois*, 119 U.S. 436. Moreover, any claim petitioner may have as to the lawfulness of the arrest should be raised in the pending criminal case. Cf. *DiBella* v. *United States*, 369 U.S. 121. In these circumstances, mandamus is not available. *Will* v. *United States*, 389 U.S. 90.

It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1969.

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